CAPPER-VOLSTEAD IMPACT ON COOPERATIVE STRUCTURE

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FOREWORD

Cooperatives' increasing size and effectiveness have heightened public awareness of their existence. As a result, more people today want to know more about cooperatives – in particular, how they've developed and the reasons behind their uniqueness.

A leading topic about cooperatives' uniqueness concerns legal interpretations of the Capper-Volstead Act and other laws and their impact on cooperative growth and scope of operations. Interest in this area was sufficient to convene in April 1974 a Symposium on Cooperatives and the Law. It was conducted by the Wisconsin University Center for Cooperatives.

This publication is one of the papers presented at the symposium. It is being published as a continuing educational reference to bring about a better understanding of the economic effect that laws such as Capper-Volstead can have on cooperatives. Joseph G. Knapp, its author, has pursued a lifetime career encouraging and guiding cooperatives to take full advantage of the opportunities for growth under Capper-Volstead. He served as the first administrator of Farmer Cooperative Service, when it was established as an agency in the U.S. Department of Agriculture in 1953. He served in that post until his retirement in 1966.

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CONTENTS

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Beginning With the Sherman Antitrust Act

To understand how the Clayton Act and the Capper-Volstead Act came into being, we must go back to the Sherman Antitrust Act of 1890. This act was sponsored primarily by farmers to control the "trusts" that were then getting a good grip on the Nation's economic life. In the words of the eminent historians, Charles and Mary Beard, "This act offered a prescription which they deemed a remedy for the disease—the dissolution of all great industrial associations into competing parts, cutting prices for consumers." According to the Beards, this act "in inpenetrable language, forbade all combinations in restraint of foreign and interstate trade."[1]

Farmers believed that control of the trusts under the act would give them the benefits of competition. Because the development of cooperative marketing associations at that time was in its infancy it didn't seem necessary in drawing up the act to exclude cooperative organizations from its prohibitions. However, it is significant that in the debate on the bill there was some concern that it would inhibit farmers from developing organizations "for effective commercial action." Senator Stewart thought it might be necessary for farmers to create organizations strong enough to protect their interests in the marketplace. He said: "This measure strikes. . .at the very root of cooperation. . .When capital is combined and strong, it will for a time produce evils, but if you take away the right of cooperation you take away the power to redress those evils: it gives rise to monopolies that are protected by law, against which the people cannot combine." Senator Sherman accepted this argument and proposed an amendment that provided the act should not be construed to prohibit "any arrangements, agreements, associations, or combinations among

persons engaged in horticulture or agriculture made with the view of enhancing the price of their own agricultural or horticultural products." This proposed amendment was lost in the final rewriting of the bill as being unnecessary. It was not deemed desirable to limit the proposed law in any way.[2]

Until amended by the Clayton Act 24 years later, the Sherman Act was the unmitigated law of the land, but, as the Beards pointed out, it provided "no barrier at all" to the growth of powerful business corporations. There was a tendency for the law to be strictly construed so that more concern was attached to the techniques of restraint of trade than with the great problem of monopoly power that concerned farmers. Moreover, under the Rule of Reason enunciated by the Supreme Court in 1911, large business combinations were not restricted, so long as their methods were not deemed "unreasonable."[3]

Thus, when farmers began to develop strong cooperative marketing organizations after 1890 they found the Sherman Act more of a barrier than a help. In fact, the act was frequently used against them.

Agricultural Cooperatives Become Significant

It is important that we realize what was going on in agriculture during the early 1900's. This was when the first major large-scale cooperative marketing organization was getting rooted—the California Fruit Growers Exchange, now Sunkist Growers, Inc. This was when the National Grange was giving much encouragement to cooperative enterprises and when the National Farmers Union and the American Society of Equity were established to promote cooperative organizations. This was when the county agent demonstration extension system began to bring scientific methods to farming. This was when President Theodore Roosevelt set up the Country Life Commission, which found that the great need of farmers was better organization. In fact, the report of the commission said: "There must be a vast enlargement of voluntary organized effort among farmers themselves . . . We have only begun to develop business cooperation in America." This was when the foundations of the cooperative Farm Credit System were laid to provide farmers with financial help. Moreover, it was at this time that the U.S. Department of Agriculture began to encourage cooperative organizations through the Office of Organization and Markets, and when the land-grant agricultural colleges began to give courses in cooperation.[4]

One of the strongest incentives to the formation of cooperative organizations during this period was the desire to provide a method of business organization for farmers that would be strong enough to offset the power of business combinations continuing to flourish despite inhibitions provided by the Sherman Act. Confronted by large corporate organizations on every side, farmers increasingly became convinced that their economic salvation depended on their ability to fashion counter forms of organization adapted to their own needs. This desire to emulate the power of the big business corporation while preserving their own economic and social independence was thus a powerful factor, favorable to the development of cooperative organizations. The leader in enunciating this viewpoint was G. Harold Powell, general manager of the California Fruit Growers Exchange. In his book, *Cooperation in Agriculture,* published in 1913, he pointed out that a "tremendous loss in rural efficiency results from the lack of organization among farmers . . . Everything he sells—cattle, milk, wheat, poultry, eggs, fruit—is sold to organizations of capital, which also may operate as a predatory combination."

Clayton Act Goes Part Way

When the Clayton Act of 1914 was passed to remedy the weaknesses and abuses of the Sherman Act, farmer cooperatives had grown greatly in numbers and strength and in the words of Edwin G. Nourse "there was a fairly active interest in securing a positive statement protecting farmers' associations from a statute designed primarily to curb the monopolistic tendencies of the industrial 'trust.' The result was a clause defining a distinctive type of agricultural association that would not be regarded per se as a combination in restraint of trade."[5] The text of this clause—section 6 of the Clayton Act—was:

"Sec. 6. That the labor of a human being is not a commodity, or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural associations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organization, or the members thereof, be held or construed to be

illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

As Mr. Nourse has explained: "Section 6 defined a particular type of business organization for mutual benefit rather than commercial profit and declared that this form of business organization did not fall under the prohibitions of the anti-trust law, even though a literal application of its phraseology might seem to embrace it. The definition employed did not apply to all or even the dominant element of the so-called cooperative organizations of the time, and hence was by no means a statute of exemption to farmers as a class." Although some were inclined to call section 6 "an empty victory" Mr. Nourse considered it a "rather tangible victory to have secured an affirmative statement defining a type of organizations which were not to be construed as illegal combinations whose mere existence was forbidden."[6]

In the years following 1914, it became clear that section 6 of the Clayton Act did not meet fully the needs of an expanding cooperative movement. This was evidenced by many legal actions charging dairy bargaining cooperatives with being in restraint of trade. Under constant harassment from milk dealers, these and other dairy marketing organizations formed themselves into the National Cooperative Milk Producers Federation in 1916 to solidify their strength and protect their general interests. Soon afterwards, this federation joined with the National Grange, the National Farmers Union, and other farm organizations to form the National Board of Farm Organizations with headquarters in Washington, D.C. Thus, for the first time, cooperative organizations had established a unified voice in the Nation's capital.

Drive for Capper-Volstead Act

At a meeting of the National Board of Farm Organizations in the fall of 1917, the National Milk Producers Federation proposed that steps be taken to establish the farmers' right to organize and operate cooperative associations without fearing conflict with the antitrust laws. This resulted in a resolution passed by the 200 organization representatives present that declared:

"Producers and consumers are bound together by economic laws which they did not make and which they cannot repeal. Between

these two are powerful agencies whose only interest it is to take such toll as they may, as products are passing from producer to consumer. These agencies, by reason of their financial strength, their perfect organization, and their far-flung financial connections, exercise an influence far greater than is warranted by their numbers or the service they perform. We therefore urge upon Congress the necessity of such an amendment to the antitrust laws as will clearly permit farmers' organizations to make collective sales of the farm, ranch, and dairy products produced by their members. Such organizations, with liberty of action, can insist that the agencies engaged in processing and distribution sell such products at prices as low as may be consistent with the cost of production and distribution."

This was the first crystallization of the drive of farmer cooperative organizations for remedial legislation relating to the antitrust laws. It was to result 5 years later in the passage of the Capper-Volstead Act.[7]

In response to this resolution, a bill was drafted to achieve the desired objective. The chief draftsman was John D. Miller, who as chairman of the Legislative Committee of the Dairymen's League had successfully led the fight for remedial cooperative laws in the New York State Legislature. With the support of the major farm organizations in New York State it had been possible to obtain necessary amendments to State laws which enabled the league to function without interference.

After the bill was drafted, Senator Arthur Capper, a Republican, agreed to sponsor the bill in the Senate. In the House, Congressman Hersman, a Democrat from California, sponsored the bill. The Capper-Hersman bill was designed as an express amendment to section 6 of the Clayton Act. It omitted the words "not having capital stock" and provided that "Associations corporate or otherwise of farmers. . .engaged in making collective sales for their members or shareholders" of "products produced by their members or shareholders are not contracts, combinations or conspiracies in restraint of trade or commerce."

As could be expected, the bill met with vigorous resistance from handlers of farm products. As Mr. Miller later reported: "Middlemen recognized that if this bill became a law their power to dictate prices to farmers would end and for this reason they sought in various ways to create public opposition to the bill." Illustrative of the attack on the bill was an editorial in the September 12, 1919, issue of the *New York Evening Journal* which endeavored to enrage the public against

the measure. This editorial singled out Mr. Miller for attack as the representative of the "Milk Trust" who "was endeavoring to save [his clients] from jail." However, these tactics had little effect. In the words of Mr. Miller: "The principal effect of this editorial and other like attacks was to make the farmers of New York State and of the Nation more active in support of the bill."

Hearings were held on the Hersman bill but no formal action was taken by Congress on the measure during 1919. Following the hearings, Congressman Volstead, then chairman of the House Judiciary Committee, invited Mr. Miller to his office for a conference. Mr. Volstead indicated that his committee had become convinced that some such law should be enacted, but that he had two suggestions to make. One was that the bill be sponsored in both houses by Republicans because the Republican party would probably be the dominant party in the coming session of Congress. The other suggestion was that the bill should be rewritten in affirmative language instead of being an express amendment to either the Clayton or Sherman laws. In other words, he proposed that the bill should recite the rights and powers therein given to farmers without any mention of prior laws. Mr. Volstead's other suggestion was that "the prospects of having the bill pass the house would be largely increased if some provisions for the regulation of farmer cooperatives were added so that if they demanded excessive prices appropriate action could be taken by some public official."

Congressman Hersman agreed with the logic of Volstead's suggestion that he give up the sponsorship of the bill in favor of a Republican, and after a conference between Congressman Volstead and the officials of the farm organizations that were supporting the bill, Mr. Volstead consented to sponsor it in the House.

In conformity with the suggestions made by Congressman Volstead, the bill was rewritten and submitted to Senator Capper, Mr. Volstead, and the representatives of the farm organizations. After several conferences with these parties the bill was at last drafted in substantially the form of the finally enacted Capper-Volstead Act. It was then introduced in the Senate by Mr. Capper and in the House by Mr. Volstead.

It may now be worthwhile for us to examine section 1 of the bill, which with an amendment to be mentioned later, became section 1 of the Capper-Volstead Act.

"*Be it enacted, etc.,* That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut

or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. *Provided, however,* that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 percentum per annum.

Section 2, which endeavored to meet Congressman Volstead's suggestion that some provision be made for regulating cooperatives under the act, "authorized the Secretary of Agriculture, if and when he found that farm cooperatives had unduly enhanced prices, to order them to cease and desist from enforcing such prices and if they neglected to obey such order an action at law should be instituted by the Attorney General requesting the court to enforce such order."

The bill was passed in the House by a large majority but it met with stiff resistance in the Senate. After extensive hearings of the Senate Judiciary Committee, a subcommittee under the chairmanship of Senator Thomas Walsh of Montana submitted a report that discarded section 2 and substituted the following statement: "Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly." The bill so revised was then passed by the Senate after considerable debate. However, the House refused to concur in the Senate changes so the bill died for that session of Congress. When Congress convened in 1921 the bills were reintroduced. On May 4, 1921, the House passed the bill with a large majority. In the Senate, the bill was again referred to Senator Walsh's subcommittee. It reported out the bill except for section 2 which was replaced by a different but, in Mr. Miller's words, "as destructive" a provision as that of a year before. The new provision read:

"Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly, or to exempt any

association organized hereunder from any proceedings instituted under an act entitled 'An Act to Create a Federal Trade Commission,'. . .approved September 26, 1914, on account of unfair methods of competition in commerce."

Shortly after the subcommittee reported to the Senate, opponents of the bill sent a "brief of argument" against the bill to each member of the Senate. In an effort to meet the allegations of this brief, Mr. Miller prepared two briefs that were sent to each Senator. They dealt with the inability of farmers to form monopolies and the effect of the Senate amendments. These briefs presented in a nutshell the arguments for the bill as it had passed the House. The following excerpts are of direct interest to us today:

". . .The purpose of the first paragraph of Section One is to authorize combinations of farmers while the amendment is to the legal effect that if they do thus combine they violate the law.

"The whole aim of this remedial legislation is to make clear and definite the law which, because of the ambiguity of Section Six of the Clayton Act, is now neither clear nor certain. By the Senate amendment there is substituted for the present uncertainty a far greater uncertainty.

"Under the Senate amendment no one could safely predict the legal status of such associations. No more successful method of deterring farmers from attempting to market their products collectively can be devised than such an uncertainty that causes them to be reluctant to make the investments necessary for the efficient operation of their marketing associations. By the bill as so amended the Senate is saying to the farmers of the country, we believe in farm organizations, we believe you should organize, but you must do nothing after you have organized.

"It is obvious that no such associations can efficiently operate unless they handle a supply large enough to efficiently process and market such products. . . To do this [farmers] must combine and form an Association that has some of the features of a monopoly, and the Senate amendment would because of this fact immediately outlaw such association."

Some weeks after Mr. Miller supplied his briefs to each Senator, the National Board of Farm Organizations sent out a statement to its general mailing list that presented Congressman Volstead's "complete disagreement with the action taken by the Senate Judiciary

Committee on the Cooperative Bill." In this statement, Congressman Volstead said: "The natural and inevitable effect of cooperative farm associations is and always must be to lessen competition among the farmers in the sale of their products, and to do that they must control the sale of a certain amount of such products. If they are not to be permitted to do that, the Senate might as well say so in so many words and not camouflage their intention by pretending to favor cooperation."

During 1921, support for the House version of the Capper-Volstead Bill had been steadily growing. In the 1920 election campaigns, both parties had declared themselves in support of the principles of this legislation, and the so-called Farm Bloc was marshaling support for it. The establishment of the powerful American Farm Bureau Federation in early 1920 to bring business methods to agriculture also greatly strengthened the hands of the proponents of the measure. This was the situation as 1922 opened. Only the obduracy of a group in the Senate, led by Senator Walsh, held up the passage of the bill.

At this juncture, the Secretary of Agriculture called a National Agricultural Conference, January 23-27, 1922, which brought together representatives of agricultural, labor, business, and other organizations.[8] In the opening address at this conference, President Warren G. Harding said: "American farmers are asking for, and it should be possible to afford them, ample provision of law under which they may carry on in cooperative fashion those business operations which lend themselves to that method, and which, thus handled, would bring advantage to both the farmer and his consuming public."

In summing up the conference, Secretary of Agriculture Henry C. Wallace called the President's address an "unequivocal demand for the right of farmers to cooperate in marketing." The President's views were supported by many business leaders who saw the Capper-Volstead bill as necessary for the healthy development of American industry. One of the Nation's business leaders, Thomas Wilson, head of the Wilson Packing Company, in addressing the conference said:

"I believe that the time has been reached when associations of producers, under proper supervision, should systematize the orderly marketing of their products. . . I think that the power to do so should be clearly sanctioned by law, and to that end I think the recent Capper-Volstead bill authorizing associations to regulate shipments

of farm products is sound in principle, and would, if properly acted upon, do much toward solving many important economic problems now confronting industry in this country."

One of the major addresses to the conference was given by G. Harold Powell, general manager of the California Fruit Growers Exchange. Speaking on "The Fundamentals of Cooperative Marketing," he said:

"There should be an affirmative statutory recognition that farmers have the legal right to organize, to do those things that are to the economical and orderly conduct of their business from production to the consumption of their product, to act collectively in doing those things which the individual farmer would otherwise do for himself, to form purchasing, warehousing, distributing or other necessary agencies, to confer among themselves and to acquire and disseminate information for the orderly purchasing, distributing, and marketing of their supplies or crops, to finance undertakings and to enter into necessary financial relationships, to handle their questions as distinct agricultural problems. There should also be recognition of this legal right to sell in open competition among their different units or under uniform conditions through a central agency, and to determine the prices which fairly reflect the law of supply and demand . . . Farmers should be given the right to organize in whatever form is best adapted to meet the inherent needs of a given agricultural agency. . . Farmers . . . should realize the desirability of having the Government, which gives them the right to cooperate, lay down the conditions under which the privilege shall be exercised, in order that acts that are prejudicial to the public interest in any plan or form of organization, may be eliminated. . . ."

The report of the Committee on Marketing, adopted by the conference, urged:

"The recognized form of cooperative action in business which has resulted in the great industrial development of this country through the coordination, consolidation, and concentration of capital and management, is not suited to the conditions prevailing in the agricultural industry. The economies and benefits both of a private and public nature arising from collective action should be made available to those engaged in agriculture to the same extent as they are available to those engaged in other industries where corporate

organization on a large scale is feasible. . . Laws have been framed primarily with reference to such industrial organizations and are not adapted to the requirements of organized producers of agricultural products desiring to avail themselves of the benefits arising from acting collectively in the handling, processing, and distribution of their products.

"We. . .urge that Congress promptly enact affirmative legislation which will permit farmers to act together in associations, corporate or otherwise, with or without capital stock, for purposes connected with the production, processing, preparing for market, handling, and marketing in interstate commerce such products of persons so engaged with specific statements of their rights, powers, remedies, and limitations, and which will permit such associations to have marketing agencies in common and to make such contracts and agreements as are necessary to effect such purposes."

With this manifestation of great popular support for the Capper-Volstead bill, the Senate moved rapidly to consider the measure. After several days of debate, the bill was finally passed on February 8 in the form passed by the House with the exception of an amendment to section 1 which provided: "That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."[9] The House quickly concurred in the Senate amendment and with the President's signature, the bill became law on February 18, 1922.

The legislative history of the Capper-Volstead Act makes it clear that it was not pushed through Congress without careful study and much debate. Almost every question that has subsequently arisen with reference to the application of the act was examined by the Congress. In general, the act was free of ambiguity. It said what it meant—and this was evident in the title of the act: "An Act to Authorize Association of Producers of Agricultural Products." As Edwin G. Nourse later said: "In the Capper-Volstead Act, Congress clearly took its position on the rule of reason as the proper criterion for applying antitrust doctrine in this particular field."[10]

Influence of Capper-Volstead Act, 1922-45

Farmers and farm leaders welcomed the Capper-Volstead Act as "The Magna Charta of Cooperation." It gave the green light for the development of strong, well organized, and well financed cooperative

marketing associations, and under its protection and guidance, cooperative marketing was to flourish as never before.

In giving Federal recognition to the cooperative form of business organization, the act provided a set of workable definitions that could be used in compiling Government statistics, in legislation, and in regulations relating to cooperatives. Moreover, the Capper-Volstead Act paved the way for passage of the Cooperative Marketing Act of 1926, which established a program of Government research and educational assistance to farmers in developing their cooperative organizations. This act also supplemented the Capper-Volstead Act by providing that: [Capper-Volstead type cooperatives] "may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them."

The meaning and scope of the Capper-Volstead Act was quickly brought to the attention of farmers and their cooperatives throughout the Nation by a statement prepared by Lyman S. Hulbert of the legal staff of USDA and by his bulletin, *Legal Phases of Cooperative Associations,* published in October, 1922.[11] It would be hard to estimate what would have occurred in cooperative development if the Capper-Volstead Act had not been passed in the form it took. One positive result of the act was to open the throttle for cooperative marketing advancement. Whether or not these organizations would have expanded so rapidly without the Capper-Volstead Act, they no doubt drew on the act for support. It encouraged the formation of strong, large-scale marketing cooperatives operating either as federated or as centralized organizations. It gave cooperatives a sense of cohesion which manifested itself in such strong national cooperative organizations as the National Council of Farmers Cooperative Marketing Associations that was established in December 1922 (later to be replaced by the National Council of Farmer Cooperatives), and the American Institute of Cooperation, formed in 1925 as a national educational body for agricultural cooperatives.

The Capper-Volstead Act thus set up a train of events that contributed to cooperative development. For one thing, the Capper-Volstead Act did much to gain judicial acceptance for the cooperative form of business organization. In its famous decision, which found constitutional the Bingham Cooperative Marketing Act *(Liberty Warehouse* v. *Burley Tobacco Growers Cooperative*

Marketing Association, 276 U.S. 71 (1928)), the Supreme Court in 1928 said: "Congress has recognized the utility of cooperative associations among farmers in the Clayton Act. . ., the Capper-Volstead Act. . ., and the Cooperative Marketing Act of 1926. . . These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest. . ."

Thus, the Capper-Volstead Act stood as a guardian to the farmers' right to organize and operate strong cooperative marketing associations. Significantly, the act also served as a foundation for the Agricultural Marketing Act of 1929 which declared it to be the policy of Congress to promote "the effective merchandising of agricultural commodities. . .so that the industry of agriculture will be placed on a basis of economic equality with other industries. . . (3) *by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies."* (Italics added).

It is also significant that the Federal Farm Board, 1929-33, and the Banks for Cooperatives of the Farm Credit Administration after 1933, followed the criteria of the Capper-Volstead Act in defining associations eligible for borrowing.

When the Capper-Volstead Act was passed in 1922, section 2 of the act was designed to protect the public from undue enhancement of prices through monopolistic action. Experience of the tobacco and other commodity cooperatives soon demonstrated that the development of monopoly power by cooperatives was practically impossible to obtain unless aided by Federal law.

Under the demoralized state of agriculture during the Great Depression, Congress saw fit to pass the Agricultural Marketing Agreements Act of 1937 which supplemented the power of cooperatives to stabilize agricultural markets for milk and specialty crops. This act permitted Capper-Volstead type cooperatives to function in cooperation with other elements of an agricultural industry under strict governmental regulations and supervision.

No significant Supreme Court decision dealt with the Capper-Volstead Act in an important way until 1939 when the Court held in the Borden case (*U.S.* v. *Borden Co.,* 308 U.S. 188) that the Capper-Volstead Act did not permit cooperatives to join with noncooperative organizations in activities prohibited by the antitrust laws. The court held in this case that:

"The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration *cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.* In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others in order to maintain artificial and noncompetitive prices. . ." (Italics added)

This case indicated that the Capper-Volstead Act could not be used as a device to circumvent antitrust law. By showing what the act did permit, it in effect established the constitutionality of the Capper-Volstead Act.[12]

Thus, the Capper-Volstead Act was generally accepted by agriculture and the public prior to World War II. Shortly before his death in 1946, John D. Miller, who more than any other was the father of the act, said: "While the Capper-Volstead Law was greatly needed if farmers were to continue and enlarge their cooperative efforts it still remains that no law that does not have the approval of a majority of the people can be permanent."[13] The testing time for the Capper-Volstead Act was to lie ahead.

New Emphasis on Cooperative Legal Problems

Under the attack of the National Tax Equality Association in the early 1940's, cooperative organizations were forced to give more attention to their position under the law. When the American Institute of Cooperation was reorganized in 1945 to better meet contemporary problems, it was deeply conscious of cooperative legal questions and Ladru Jensen, a competent legal scholar, was employed as consultant. Largely as a result of this interest, the summer 1948 issue of *Law and Contemporary Problems* published by Duke University School of Law was devoted to the subject "Cooperatives."

Because we are witnessing a period of renewed interest in and increasing attacks on cooperatives, two papers that dealt with cooperatives' legal problems deserve attention. The first is by John Hanna, professor of law at Columbia University and a close student of cooperative institutions. His book, *The Law of Cooperative*

Marketing Associations (1931), did much to gain recognition for the cooperative method of business organization.

On the subject, "Antitrust Immunities of Cooperative Associations," he wrote: "Agricultural producers' cooperatives are granted a degree of immunity by the Clayton Act, the Capper-Volstead Act, and the Robinson-Patman Act. This immunity is not absolute, but so long as the agricultural associations conduct themselves with some degree of responsibility and refrain from conspiring with nonagricultural interests, the antitrust laws need not be of much concern to those who formulate the policies of the associations."

Mr. Hanna thought that the economic power of cooperative marketing associations could easily be exaggerated. He said: "Their present size, rate of growth, and on the whole, their policies, give little cause to fear the assertion by them of any tyrannical power at an early time, if at all, on the national level . . ." However, he continued: "The foregoing considerations do not justify the conclusion that agricultural cooperatives could assert economic power combined with political power with immunity. . ." He advised cooperatives not to overreach themselves so as to endanger their antitrust standing. He went on to say that "the safe rule for the farmers' organizations is to obey the principles of the competitive system. Monopoly power as a condition of profit is largely a delusion in any event. It means stagnation instead of progress. The future success of cooperative farm marketing depends upon adherence to the practices of aggressive competition for the favor of the ultimate consumer."

The other important paper pertinent to the present situation was by Frank Evans and Irwin Clawson on "The Trend of Judicial Decisions in Cooperative Marketing." Mr. Evans was a distinguished legal scholar who had been closely involved in legal problems of cooperatives ever since the Capper-Volstead Act became law. His book (with E. A. Stokdyk) on "The Law of Cooperative Marketing" (1937) was a fine piece of legal research relating to cooperatives. In their statement, Mr. Evans and Mr. Clawson say: "The cooperative corporation has made constant progress and now is so firmly established that it has come to be regarded as a permanent part of the American economic system. . . It is clearly evident that the farmers cooperatives have made a distinct advance toward a position of equality with other businesses in our national economy."

One of the charges made against cooperatives has been that "cooperatives are exempt from the antitrust laws." This allegation—which seems deathless—has even found its way into textbooks as an

accepted truth. At the 1949 American Institute of Cooperation, Lyman S. Hulbert met this charge head on in a talk on "Farmer Cooperatives and the Antitrust Laws." He opened with these words: "One of the myths or fallacies repeated so often that many people have come to believe it is true is that agricultural cooperative associations are exempt from the antitrust laws. There is a fundamental and basic weakness in this idea—namely, it is not true." He went on to explain that neither the Clayton Act nor the Capper-Volstead Act "exempt cooperatives from the antitrust acts. . . All that [they] were intended to do was to make clear that farmers, by organizing a cooperative association, did not thereby violate the antitrust acts." He pointed out that in these acts "farm leaders were not seeking exemption or immunity from the antitrust acts. . . They were asking Congress to declare that the organization of an agricultural cooperative association was not of itself a violation of the antitrust acts. In brief, they were seeking the right to organize." Judge Hulbert sagely observed that "if the Capper-Volstead Act had been intended as a statute to exempt agricultural cooperative associations from the antitrust laws, its title would have read 'An Act to exempt agricultural cooperatives from the antitrust acts' whereas it was given the title 'An Act to authorize association of agricultural producers.' "

It seems desirable to point out here that the structure of cooperative marketing associations had continued to be much the same following the passage of the Capper-Volstead Act, although there was a marked expansion of integrated cooperative marketing organizations formed on either the federated or centralized pattern. By 1950, a majority of the independent local cooperatives had been gathered into federations and cooperatives had become proficient in the methods of big business. In an article, "Cooperative Expansion through Horizontal Integration," in the November 1950 issue of the *Journal of Farm Economics*, I pointed out that the trend toward integration both horizontal and vertical, was irresistible as long as our economy was largely dominated by large-scale industrial organizations. I said: "Since only by integration can cooperatives offer effective competition to powerful integrated noncooperative firms, it follows that unless the cooperatives can create comparable integrated concerns, their role in the future business life of the nation will be secondary. On the other hand, if they can find how to integrate progressively both horizontally and vertically, they will be able to exert a much stronger influence in economic affairs."

In 1950, the negative attitude of the Department of Justice toward cooperatives was of much concern to cooperative association

lawyers.[14] However, by 1953, the Department of Justice had become more considerate of the problems of the cooperatives. This was evidenced in an important talk given at the 1953 meetings of the American Institute of Cooperation on "Cooperatives and the Antitrust Laws" by Stanley N. Barnes, assistant chief in charge of the Antitrust Division of the Department of Justice. In this talk, Mr. Barnes said: "I think it self-evident that agricultural cooperatives are playing a major role in helping to maintain a healthy agricultural economy." He did not think that their subjection to the antitrust laws had affected their "remarkable, and indeed, prodigious growth." Mr. Barnes' view was that "agricultural cooperatives can no longer be thought of in terms of infinitesimal economic units revolving about the orbit of the Nation's economy. As the balance of power between agricultural cooperatives and other units of the Nation's economy approaches equality, these associations will find themselves more and more amenable to the economic premises which govern the rest of business. And these organizations may find it appropriate to reexamine their practices in the light of their changing status." He finished his talk with this observation:

"It is my conviction that reasonable behavior on the part of agricultural cooperatives, designed to strengthen and advance the economic well-being of the people as a whole does not depend on license to act *outside* the antitrust laws—it depends, rather, on the ability to live in "cooperation" with them. And if the first 50 years of your magnificent development is any criterion, this will be one of the simpler tasks with which the future will confront you."

In 1954, Judge Hulbert stated without equivocation: "Agricultural cooperative associations now have as well defined and certain a legal status as other types of business organizations."[15]

This view was generally supported by the *Report of the Attorney General's National Committee to Study the Antitrust Laws* transmitted on March 31, 1955. In its report, the Committee said with respect to agricultural cooperatives:

"Congressional encouragement of agricultural cooperatives need not be incompatible with antitrust prohibitions against concerted restriction on agricultural output, coercion of competitors or customers, and monopoly power either achieved by means not within Capper-Volstead Section 1 or used to 'unduly enhance' prices under the Act's Section 2." (See p. 311.) The committee did not find

that "agricultural cooperatives presently offer any serious threat to effective competition," but it held that "the growth of centrally controlled cooperative, the federated cooperative, and the use of joint marketing agencies is not to be ignored. These developments may permit control over the supply of a specific product or class of products in particular regional markets; and may in other respects weaken self-imposed restraints of such cooperatives against antitrust transgressions beyond the boundaries of exempted conduct." (See p. 312.)

One of the problems of cooperatives in gaining a fair hearing with the public has resulted from the fact that such associations are set up to perform services for their members on a nonprofit basis. This idea is almost inconceivable to those who have been nurtured in a profit-motivated business environment. To them, cooperatives represent a threat to our American private enterprise system and should be kept vigilantly under control. This widespread misunderstanding as to the nature of cooperative associations that has been encouraged by those with axes to grind was reflected in a letter I received from the editor of the *Harvard Business Review* in 1956. He asked me to prepare an article that would explain the economic nature of cooperative associations. When the article was published in the January-February 1957 issue the editor gave it the challenging title: "Are Cooperatives Good Business?" which I considered apt. From my long-time experience in working with cooperative organizations and observing their benefits both to farmers and consumers, I could but affirm that "Cooperatives are Good Business." In my article I endeavored to make clear that cooperatives represented a distinctive form of business and were a healthy part of our American free competitive private enterprise system. I said in this article:

"The cooperative form of enterprise both complements and supplements the services performed by other forms of private business, thus giving our system even greater flexibility and strength. By providing a self-help mechanism through which people and business firms can serve themselves according to their needs, the cooperative can also democratize and decentralize parts of our economic life, provide pace-setting competition for other forms of business, and give the individual a sense of belonging. It can act as a balance wheel—or a safety valve—in our economy by providing an alternative type of business organization within the free-enterprise system that we value so highly."

What Are the Legal Limits to Cooperative Growth?

Agricultural marketing cooperatives had grown by merger and by acquisitions of noncooperative firms ever since the Capper-Volstead Act was passed in 1922, and as late as 1955 it appeared that such activity was little restricted by the antitrust laws. With the great stepup in mergers and acquisitions by noncooperative firms during and after World War II, cooperatives began to give more aggressive consideration to mergers and acquisitions as a means of enabling them to meet the power of the ever-growing noncooperative corporations.

An analytical study by Willard F. Mueller on "The Role of Mergers in the Growth of Agricultural Cooperatives"[16] shows that for the period 1940-55, marketing cooperatives greatly lagged behind large noncooperative firms in achieving the advantages of large-scale organization and market power through mergers and acquisitions. Mueller concluded from his study that "while there may be practical obstacles to cooperative mergers, many cooperatives must overcome these obstacles if they are to survive and meet the challenge of today's changing industrial environment."

It is significant that Mr. Mueller made no reference to the antitrust laws as a factor inhibiting cooperative mergers and acquisitions for the period covered by his intensive study—1940-55. This problem became nonacademic when the Department of Justice filed a case in November 1956 which charged a milk producers' association *(United States* v. *Maryland and Virginia Milk Producers Association, Inc.)* "with acquiring a milk distributor's assets to (1) eliminate competition between the acquired distributor and distributors purchasing milk from the cooperative, and (2) eliminate the acquired distributor as a marketing outlet for milk produced by nonmembers of the cooperative." In this case the milk producers' association claimed protection under the Capper-Volstead Act.

Raymond J. Mischler, the highly respected authority on cooperative law in the Office of the General Counsel of the USDA, examined the issues presented by this case in his review of new legal developments affecting cooperatives at the meeting of the American Institute of Cooperation in the summer of 1958.[17] In this talk, he said:

"One of the most vigorously discussed topics wherever cooperative leaders meet these days is the general economic trend toward business integration, both horizontal and vertical and the extent to

which cooperatives should and can keep pace in order to offset corresponding industrial concentration... In certain areas and activities, such integration may spell the difference between efficient and profitable operation on one hand and declining business or failure on the other. Accordingly, cooperatives of all sizes and kinds are increasingly asking the question: *What are the limits within which a cooperative can acquire the stock or assets of another corporation by purchase, merger, or consolidation?* (Italics added)

Mr. Mischler indicated that "until the pending (Maryland and Virginia) case—and perhaps several others—are determined, it is impossible, frankly, to delineate with precision the scope of cooperative activity which is justified under the applicable laws." However, Mr. Mischler was careful not to leave the impression that substantial progress could not be made in cooperative integration, in that "many projects can be undertaken, which will withstand the known tests provided they are approached with careful analysis and proper planning."[18] Mr. Mischler's views were supported by an important unsigned article in the *Virginia Law Review* (Volume 44, No. 1, 1958) entitled: "Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense," which carried this timely observation:

"The wise agricultural groups who never push their collective bargaining power to the ultimate will show the smallest legal expenses on their balance sheets. Meanwhile, the judicial challenge is to obtain for consumers the efficiencies of large-scale cooperative organization while defining with some precision the range of cooperative activity justified by the legislative grants. Until this case law takes form, or unless Congress miraculously intervenes, the enforcement agencies will continue to play cat and mouse with agricultural cooperatives."

While the Maryland and Virginia case was moving to a decision by the Supreme Court, a bill was introduced in 1959 by Senator Long "To Clarify and Amend the Capper-Volstead Act." According to Senator Long, its purpose was "to make clear that farmers and farmers cooperatives should be able to acquire processing and marketing facilities." In his statement at the hearings on this bill, Senator Long pointed out that large dairy corporations and retail chain systems had "crushed out their smaller competitors." He went on to say: "These monopolistic giants continue to tighten their strangle hold on

the American economy while the Justice Department seems to be very little concerned about that which is happening."[19]

While hearings disclosed that the Long bill had the support of many agricultural and cooperative organizations, USDA recommended against its enactment in that "consideration of legislation of this type should be deferred until the U.S. Supreme Court has disposed of. . .the case against the Maryland and Virginia Milk Producers Association." This view prevailed.

In early 1960, the subject of how cooperatives could increase their bargaining power thus was of great concern to cooperative leaders. While some believed that cooperatives were severely handicapped under the antitrust laws, others maintained that cooperatives under existing law had within themselves the capacity to develop adequate bargaining power for their needs. At this juncture, I was asked to give a talk on "Developing Farmer Bargaining Power Through Marketing Cooperatives" at the meetings of the National Council of Farmer Cooperatives in January 1960. On this occasion I pointed out how many cooperative organizations had developed bargaining power in a "very effective way by the application of tested procedures of good management."[20] I gave as outstanding examples Sunkist Growers, Inc., and Land O' Lakes Creameries, Inc. I concluded that some of the factors restricting the bargaining power of cooperatives were lack of planning, lack of research, lack of good membership educational work, weak boards of directors, and ineffective management—all factors that were controllable by the cooperatives themselves. I pointed out that most great concerns grew largely from internal strength and that their growth was not given to them. I maintained that a "strong organization, like a strong individual, is bound to have influence, and influence is bargaining power."

Supreme Court Calls a Halt

Until 1960, many agricultural marketing cooperatives believed that the Capper-Volstead Act provided them with a broad immunity from the antitrust laws, so long as they did not join with noncooperative organizations in noncompetitive practices. The Supreme Court's decision in *U.S.* v. *Maryland and Virginia Milk Producers Association* on May 2, 1960 (362 U.S. 458), placed cooperatives in the same relation to the antitrust laws as any other business corporation and for all practical purposes "completely laid to rest" this argument. The Court concluded that the general

philosophy of the Capper-Volstead Act and section 6 of the Clayton Act was "simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations." The Court went on to say:

"This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperatives will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws. It does not suggest a congressional desire to invest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own business in their own legitimate way."[21]

This decision was received with mixed emotions by leaders of the agricultural marketing cooperatives. While undoubtedly the Maryland and Virginia Association had engaged in questionable practices in its attempt to gain control over supply, it was feared that the decision would weaken the cooperative right to strengthen its bargaining power through mergers and acquisitions. At this time, powerful noncooperative agribusiness firms were intensifying their position by merger and acquisitions and it appeared to many that the balance would swing definitely against agricultural cooperatives unless they had full freedom to merge and consolidate their operations.

In the light of the Maryland and Virginia decision many cooperative leaders felt that the Capper-Volstead Act should be augmented "to assure to cooperative associations the full right of acquisition of other companies, through purchase, merger or consolidation," and in response to this demand the Senate Committee on Agriculture approved a provision in the 1961 farm bill that would have amended the Capper-Volstead Act to give cooperative associations the assurance they desired. However, many cooperative association attorneys agreed that it would be unwise to amend the act in the proposed way and no action was taken by Congress.[22]

The effect of the Maryland and Virginia case came up for discussion in the meetings of the American Farm Economic Association in the summer of 1962.[23] One of the speakers, Professor Robert L. Clodius of the University of Wisconsin, took the position that agriculture required special consideration "as the real-world industry approximating atomistic competition," while "industries buying from or selling to agriculture are characterized by imperfect competition. . . The conclusion to be reached here is that agriculture is disadvantaged in the marketplace. The farmer is a price-taker but

not a price-maker." Referring to cooperatives as "the instruments of private economic action through which farmers have sought to build up their market power," Professor Clodius held that in the Maryland and Virginia Milk Producers case, "the cooperative was obviously trying to enhance its market power with the effect of raising prices and incomes to agricultural producers. It was proceeding on the assumption of immunity under section 6 of the Clayton Act and the Capper-Volstead Act and the assumption that the Secretary of Agriculture had primary jurisdiction to see that the price of milk was not unduly enhanced."

Reasoning from this case, Professor Clodius concluded that the Capper-Volstead Act was of little value in helping farmers obtain adequate bargaining power. He likened the problem of farmers to the fairy story about the emperor "who thought he had the finest suit of clothes in the world on the authority of a fast talking tailor, and was parading blithely along his way until a child pointed out that he didn't have on any clothes at all." Professor Clodius then said: "If a cooperative leader who has been vigorously and aggressively trying to enhance the market power of farmers through business-like private action now feels naked, stripped of immunity, and completely exposed before the Antitrust Division of the Department of Justice, he is feeling the cool breezes correctly. He doesn't have any clothes on as it now develops, never did have."

Dr. Edwin G. Nourse did not agree. He said:

"Personally, I do not discern in recent Supreme Court decisions any threat to the future health and vigorous growth of economic organization among farmers, including such integration, both horizontal and vertical, as is called for by the progress of technology and of business organization in other segments of the economy.

"The view of the previous speaker that the Supreme Court in striking down the special immunity claim of a cooperative association leaves the farmer 'naked, and completely exposed before the Antitrust Division of the Department of Justice' seems to me to be only a half-truth. Rather than saying 'he doesn't have any clothes on' I would say he stands before the Department and the Court like any other organized business, clad in a modern business suit, made of stout material, well-tailored to the character of his occupation, protecting both his decency and the moral standards of society."

The Supreme Court's decision of May 28, 1962, on the Sunkist case *(Sunkist Growers, Inc.* v. *Winkler and Smith,* 370 U.S. 19) gave

cooperatives some consolation. In this decision, the court held that Sunkist Growers and its two wholly-owned subsidiaries—the Exchange Orange Products Company and the Exchange Lemon Products Company, were exempt from the conspiracy provisions of the antitrust laws with respect to their interorganizational dealings because of the immunity conferred by section 6 of the Clayton Act and section 1 of the Capper-Volstead Act. As one prominent cooperative attorney said: "While not helpful on the extent of legal monopoly or permissible activities of a cooperative in a monopoly position, nevertheless, this does seem somewhat comforting to the federated type of cooperative in its marketing functions."[24]

Constructive Developments

A number of constructive developments occurred at about this time and it became apparent that the Maryland and Virginia case was more helpful than harmful in clarifying the position of farmer cooperatives under the antitrust laws. Cooperatives were beginning to take a more positive position on what they might do.

Of particular significance was a great strengthening of cooperative milk marketing associations through improved organization and operation and better coordination of their sales programs. A study by the Farmer Cooperative Service found that producers' milk marketing organizations had made substantial progress in increasing their volume of milk marketed since 1957. While part of the increase came from mergers and acquisitions, a larger part could be attributed to consolidations and improved managerial efficiency.[25] Contributing to this growth was the development of regional federation starting with the formation of the Great Lakes Milk Marketing Federation in 1960, which brought together for bargaining and other general purposes a number of milk marketing cooperatives in Michigan, Ohio, and nearby States. Its favorable record led to the establishment of Associated Dairymen, Inc., which embraced many of the milk marketing associations in the Midwest.[26]

Another constructive development was the National Conference on Cooperatives and the Future, sponsored by the Advisory Committee on Cooperatives to the U.S. Department of Agriculture held in Washington, D.C., during April 1963. One of the questions considered was: "How can farmers develop more bargaining power through cooperative merger, acquisition, and joint action?" It was the consensus of the group "that many opportunities for merger

among cooperatives exist and can be accomplished without being questioned by the Antitrust Division of the Department of Justice." It was proposed that: "A clearcut procedure for securing antitrust clearance for mergers and acquisitions by farmer cooperatives should be established and that this authority be vested in the Secretary of Agriculture."

During the next year, the Department of Agriculture sought to come to agreement with the Department of Justice on a desirable premerger clearance procedure that would facilitate desirable cooperative mergers. Although no official arrangement was developed, a better working understanding with regard to acceptable mergers was worked out.

At the Institute of Cooperation in 1965, Lyman S. Hulbert opened the discussion on legal matters by saying: "There is still much confusion and misunderstanding regarding the nature, character, and objectives of agricultural cooperatives." To some extent, this confusion was clarified by a talk on "Agricultural Cooperatives and the Antitrust Laws" by Everette MacIntyre, a member of the Federal Trade Commission. It was his view that "Antitrust is good for the cooperative and the cooperative movement has a vital role to play in our competitive economy." Mr. MacIntyre believed that there was then general agreement that "per se hard-core violations of the antitrust laws as, for example, predatory pricing or pricefixing agreements, will be prosecuted in the future in the case of cooperatives as they have been in the past. In such instances, the antitrust exemption obviously will not apply. On the other hand, in those instances where an acquisition or other form of integration by a cooperative is concerned and where no predatory activity is involved in the transaction, it is my belief that the antitrust enforcement agencies will apply the rule of reason unless the antitrust exemption is applicable in the particular case." It was of interest that Mr. MacIntyre construed cooperatives as being anti-monopoly in character as a reason for giving them consideration under the rule of reason. He suggested that "strengthening farmer cooperatives may play an important complementary role supplementing enforcement of the antitrust statutes." Furthermore, he did not look apprehensively on cooperative mergers that would make cooperatives stronger as business entities. He concurred in the idea that stronger cooperatives would "provide countervailing power against increasing concentration in other segments of the agricultural economy."[27]

Shortly after this expression from a member of the Federal Trade Commission, Donald Turner, then Assistant Attorney General in

charge of the Antitrust Division of the Department of Justice, addressed the Cooperative Bargaining Conference held in January 1966 on "Antitrust Issues in Cooperative Bargaining." He summarized his views on the current state of antitrust law relating to cooperatives as follows: "I believe (1) that while farmers may form agricultural cooperatives with comparative immunity and make all agreements reasonably ancillary to their proper business, such cooperatives, with few exceptions, must conform to the same antitrust rules that govern other business; and (2) that membership in cooperatives must be uncoerced." Mr. Turner did not believe "that a case for expanding the exemption" had been made out, nor in view of its "remarkable and prodigious growth" did he "believe that exposure to the antitrust laws [had] unduly hampered the expansion of the agricultural cooperative movement." He saw little reason to believe that "the antitrust laws will stand in the way of continued desirable expansion and growth."

The National Food Marketing Commission Report

An important development bearing on the antitrust problem of marketing cooperatives was the establishment by Congress in 1964 of the National Commission on Food Marketing to study and appraise the changes taking place in the food industry. In its report issued in June 1966, the commission found a high degree of concentration in the food industry with a trend toward increasing conglomerate organization. The commission said: "Food conglomerates are likely to grow, to reduce the number of independent competitors in the industry as a whole, and to lace the various segments of the industry more nearly into a single system characterized by the kind of nonprice competition in which they excel." (p. 95.) On the subject of market power, the commission said: "Market power is the ability to influence prices or other terms of trade in a way favorable to the business firm. It may be gained through a firm's own strong position or conferred upon the firm by the weakness of those with which it deals. Two groups in the food industry appear to have substantial market power; retailers, including many of the small chains; and large manufacturers, usually diversified with strong national brands." (p. 95.) The report went on to say: "Unorganized farmers have no positive market power at all and depend upon competition among buyers to obtain the full value that market conditions justify for their products." (p. 97.)

Under the heading "Farmer Bargaining Power," the commission said: "Food industry developments pose, more clearly than ever before, the question of how farmers can obtain sufficient bargaining strength to defend their prices and other terms of sale. Group action is needed if any substantial changes in sales arrangements are to be made." (p. 102.) The commission also said: "We believe that farmers do not yet fully appreciate the importance of cooperative action in marketing their products. We support all assistance government can reasonably give to producer cooperation." (p. 110.)

Under the heading: "Regulatory Practice and Policy," the Commission said: "Controlling concentration in the various branches of the food industry is essential to maintaining a distribution of market power and a socially useful employment of resources." The report pointed out that "The various statutes—both general and specific—dealing with market power in the food industry, collectively seek an equitable and workable distribution of power by restraining concentrations of great strength and by lending support to the weak. Antitrust laws are in the first category; the Capper-Volstead Act and the Federal marketing order programs are in the second. Extension of policy in both respects appears desirable; but the policy should be conceived as an impartial effort to achieve an appropriate distribution of power rather than as a commitment for or against any group." (p. 103.) Thus, the report indicates that the commission favored strengthening rather than restricting the objectives sought by farmers under the Capper-Volstead Act.

At the 1966 meetings of the American Institute of Cooperation, Dr. G. E. Brandow, executive director of the commission, discussed the implication of its report for producer cooperatives.[28] In his talk, he said: "Cooperatives have to be efficient and progressive to hold their own in competition; they have to be especially effective even to do a modestly better job for members than other business firms ordinarily will do." In discussing the great changes in market structure that had occurred in recent years, he pointed out that the trend toward integrated and conglomerate firms raised a problem for cooperatives in finding capital and in maintaining membership identification. Yet he held that "the advantages of extending cooperatives' activities may require them to move in that direction." He was of the opinion that "much cooperative activity will only place farmers on a par with private competitors and will not have anticompetitive consequences though joint action is involved."

Coming of Multimarket Centralized Dairy Cooperatives

Establishment of milk marketing federations in the early 1960's set the stage for more completely integrated regional centralized associations to achieve increased efficiency through larger scale of operations and greater bargaining power through better adjustment of supply to market needs.[29] Milk Producers, Inc., the first organization of this type was formed in 1967 by a consolidation of six producer organizations in Kansas, Oklahoma, Texas, and Arkansas, and within a year, eight additional cooperatives in the Southwest merged with it. MPI provided for a completely integrated, centrally directed regional marketing organization with producers as direct members. It represented an innovation in dairy marketing structure. In explaining the rationale for the new organization, its general manager in 1968 said: "There is no source material offering templates for stamping out the kind of organization called for. We must ourselves fashion the administrative organizational structure."[30]

Progress of Milk Producers, Inc., was spectacular and its success gave great impetus to merger activity throughout the United States. In 1969, this organization consolidated with 14 milk producers cooperatives in the Chicago milk market area to form an even larger entity, Associated Milk Producers, Inc. By 1971, AMPI had attained a sales volume of $853 million, making it the largest cooperative marketing enterprise in the United States. (By 1973, sales volume had increased to more than a billion dollars.) Following the lead of AMPI, cooperatives serving milk markets in Iowa, Kansas, Missouri, and Illinois in 1968 formed a similar regional organization—Mid-America Dairymen, Inc.—and soon afterwards other comparable consolidations occurred in other areas.[31]

Land O' Lakes "Invisible Merger"

While the large centralized milk marketing cooperatives were being formed by consolidation of many smaller milk producers' organizations, the already well-established dairy products marketing cooperatives were also making increasing use of mergers and acquisitions to strengthen their position. Outstanding in this regard was the long-established federation, Land O' Lakes, Inc., which quietly proceeded to bring into the Land O' Lakes organization many smaller dairy marketing and processing organizations. From 1968 to

1972, the extent of its mergers and acquisitions increased Land O' Lakes' market volume by $168 million.[32] Thus, by 1970, the marketing structure of the dairy products marketing cooperatives in the United States was greatly expanded and strengthened by mergers and consolidations.

Straws in the Wind—1967-72

From 1967 to 1972, cooperative marketing associations proceeded to merge and acquire properties on the general assumption that they had the right to do so under the Capper-Volstead Act. During these years, cooperatives were little harassed by the Department of Justice under the antitrust laws. The expressions of legal advisors generally reflected the cooperative euphoria of this period. For example in speaking on "Cooperatives and the Antitrust Laws" at the AIC meetings in 1967, L. Gene Lemon pointed out that "Cooperatives will have little antitrust trouble if they are aware of the law, some of the defined limits of immunity, and act accordingly, standing on their own feet without expectation of special treatment." It was his view that: "Responsible cooperatives, growing because of faith among farmers rather than because of predatory practices, will make greater contributions to agriculture and to the nation in the future than they have in the past."

In December 1967, the Supreme Court made clear that Sunkist Growers, Inc., (389 U.S. 384) could not use the Capper-Volstead Act as a defense in a private antitrust suit as long as it included among its voting members certain agency packinghouses that did not qualify as agricultural producers. Confronted with this decision, Sunkist promptly reorganized so as to fully comply with the provisions of the Capper-Volstead Act.[33]

In a talk on "Acquisitions and Mergers by Agricultural Cooperatives—the Present State of the Law" at the AIC meetings in 1968, Frank Shackleford expressed the view that "the application of the antitrust laws to mergers and acquisitions by cooperatives has... reached a certain plateau of statutory and decisional law upon which we can reasonably base certain conclusions and standards of conduct for the future." Holding that "the insulation of cooperatives from operation of the antitrust laws is very thin indeed," he believed that a new approach was called for which would place "emphasis upon the 'legitimate objects' which can be accomplished by mergers, acquisitions, and other combinations between cooperatives, or

between cooperative and noncooperative organizations." It was his opinion that the courts had "ignored the positive thrust of Capper-Volstead, section 6 of the Clayton Act, and other laws assuring the ability of producers to act together in marketing their products." He then said: "Now that the principle has been established that cooperatives, once formed, should be subject to antitrust laws for their wrongful conduct, perhaps we are in a position to assert [that] action under the exclusive control of producers which results only in the improvement of producers' ability to act together to market products throughout the chain of distribution is not unlawful, and that any lessening of competition caused solely thereby is not reason enough to apply the antitrust laws."[34]

At the 1971 AIC meetings, Melville C. Williams spoke on "Capper Volstead—What It Means Today." After pointing out a number of things that seemed to be clear enough, he listed several questions "to which I wish I knew the answers," such as the legality of entering into agreements with members to limit production. He concluded that "if past experience means anything the answers will be forthcoming from the courts as the cooperatives push along in their efforts to build more powerful organizations."[35]

At the 1972 AIC meetings, Eugene M. Warlich discussed "Antitrust Aspects of the Growth Question." Pointing out that there had been little interpretation of the Capper-Volstead Act with reference to a number of unsettled matters, he thought that "their resolution might best be left to the courts," saying: "Until additional decisional law clarifies the picture, the Capper-Volstead should perhaps be left intact."[36]

If I read the record accurately, the view was current in 1972 that the Capper-Volstead Act on its 50th anniversary was still a potent influence in cooperative marketing, although it didn't go as far as some cooperative managements would have liked it to go in giving cooperatives special consideration. Thus, up to 1973, it appeared that the meaning of the act had become largely clarified by court decisions and that future decisions would continue to guide the application of the act to problems that might arise. Then in the summer of 1973, a talk by the Chief of the Antitrust Division opened up a new dimension.

Challenge to Capper-Volstead, 1973

It was apparent by 1973 that antitrust law was becoming of increasing importance. As early as February 1, 1972, the Department

of Justice had brought suit against AMPI charging it with violation of the Sherman Act in various ways. The importance of this case in clarifying the position of the big regional centralized milk producers' associations was becoming apparent. In January 1973, the president of AMPI in speaking at the National Conference of Bargaining Cooperatives urged that the Capper-Volstead Act should be amended. He said: "We must clarify that no activity, including mergers, consolidations and/or acquisitions, by a cooperative per se is a violation of the antitrust laws."[37]

Shortly afterwards, on January 31, 1973, John E. Noakes of the Dairylea Cooperative addressed the Dairy Marketing Forum at the University of Illinois on the "Advantages and Limitations of the Capper-Volstead Act for Dairy Cooperatives." In this talk, he said: "Our colleagues at AMPI are engaged in a massive effort, financially and conceptually, to prevent the narrowing of the perimeters of the Capper-Volstead and deserve our constructive support and advice. Some of the issues go to the heart of effective cooperative marketing; and, if adversely interpreted, our efforts will be crippled." He went on to say: "As a result of these pending lawsuits, there is talk of amending the Capper-Volstead Act and related statutes to immunize the challenged activities. I personally have reservations about these efforts—believing that remedial legislation flows from decided, not pending, lawsuits." He continued: "In any event, the future of dairy marketing by cooperatives is under attack."[38]

Mr. Noakes' warning was born out by gratuitous testimony presented by Thomas E. Kauper, assistant attorney general, Antitrust Division, at the hearings of the Senate Judiciary Committee on Monopolistic Practices and Concentration in the Food Industry on June 27, 1973. This talk made clear that the Capper-Volstead Act was in serious danger. Mr. Kauper maintained that the Department of Justice was concerned with the enforcement of the antitrust acts, but that it was limited in what it could do by the immunity conferred on agricultural marketing cooperatives by section 6 of the Clayton Act and the Capper-Volstead Act. He said: "It must be recognized that the mandate given us is circumscribed by specific grants of antitrust immunity . . ." He then said: "Agricultural cooperatives have long enjoyed antitrust immunity for their formation and for activities which would otherwise be deemed to be per se unlawful as price fixing under the antitrust laws. . . The antitrust exemption conferred by these statutes is not absolute and certain activities of the cooperative may either destroy the exemption or go beyond the shelter it provides. Immunities of this sort are to be

strictly construed. . . I believe, without prejudging the question, that this is an appropriate time for Congress to reevaluate the need for and scope of this immunity."

Of particular concern was the fact that under section 2 of the Capper-Volstead Act, the Secretary of Agriculture had taken no action against a cooperative for enhancing prices. While Mr. Kauper admitted that "this may mean simply that cooperatives have not engaged in conduct which may 'unduly enhance' prices," it was clearly implied that the Secretary had been derelict in his duty—regardless of the economic facts.

It was Mr. Kauper's view that "Capper-Volstead was enacted in response to a situation in which a large number of small family farms were believed to be the captives of a single large processor. The co-op was envisioned as a countervailing balance. Through the co-op, small farmers could get a fair price for their commodities and not be subject to the absolute power of a single buyer. It was originally envisioned that these cooperatives would not produce serious anticompetitive effects. With many small growers as members, all selling to the co-op without limitation, it was believed that the co-op would not be able to raise the price for its products above the competitive level without creating a substantial excess of supply over demand."

While Mr. Kauper admitted that "These arguments may of course still be valid more than 50 years later," he apparently did not think so. He said: "Certainly in milk, and perhaps in other agricultural products as well, co-ops have expanded to a point where they cover a multi-State area and affect the prices paid by not just one processor, but by many." Using a pejorative word, he asserted: "A 'super-co-op' may. . .be able to raise prices to all processors, who in turn have no alternative but to pass on higher prices to consumers."

The foregoing statements provide a simplistic interpretation of the conditions under which the Capper-Volstead Act was enacted, and a simplistic interpretation of the present marketing structure of American agriculture.

It was also the contention of Mr. Kauper that the farming industry is no longer "composed of many small units." He saw "several areas of farming" but he did not include dairy among them—which "would appear to be increasingly represented by large corporations, capable of engaging in long-range planning with a significant degree of control over output." He said: "The poultry industry is well along in this development, with beef and pork following a modest distance behind." Here again it would seem that Mr. Kauper has made some

broad assumptions on limited knowledge of the facts. Few agricultural economists would deny today that there has been a great expansion of corporations into certain areas of farming, but few would claim that American agriculture is not basically still atomistic and largely represented by family farmers.

Regardless of the facts, which are apparent in agricultural economics literature and in the statistics relating to number and type of farms in the United States, Mr. Kauper concluded on the basis of the casual evidence presented:

"These changes, particularly in today's context of rising food prices, suggest the need for congressional reevaluation of antitrust immunity for cooperatives to determine, among other things, the degree to which the activities of cooperatives enhance food prices, to determine whether some size limitation should apply to cooperatives so that they do not dominate national or regional food markets, and to determine the effects of vertical integration by members of cooperatives into processing, as well as the size and functions of individual members."[39]

This sweeping recommendation deserves careful examination to determine whether it is soundly conceived. Cooperatives have nothing to hide with regard to their operations and perhaps an unbiased study of the value and significance of cooperatives to the preservation of a healthy agricultural industry in the United States would help clarify this situation.

It should be said that Mr. Kauper's testimony came as a shock to agricultural marketing cooperatives who felt that it was uncalled for and unsupported by fact. Recognizing the damage to farmer cooperatives that would result if this testimony were not answered in the same hearings, the National Council of Farmer Cooperatives which embraces in its membership about 4,500 farmer cooperatives serving more than 3.5 million farmer memberships, asked permission to reply. In submitting the National Council's statement prepared by Donald Graham, its general counsel, Kenneth D. Naden, its executive vice president, in a letter to the Honorable Peter W. Rodino, Jr., chairman of the House Committee on the Judiciary, said: "The statement of Thomas E. Kauper,. . .before your Subcommittee. . . raised by direct implication an accusation that cooperatives are enhancing food prices to the detriment of the public interest. Such a statement is alarming since it indicates an appalling lack of sound economic analysis and judgment. Indeed, farmers and their coop-

eratives should be the last area to be considered as a possible cause of unduly high food prices."

Mr. Graham in his statement said: "Justice made a gigantic and unjustified leap from its experience with a few alleged unfair trade practices to a broad generalization about the market power of all large cooperatives. Our statement is made for the purpose of analyzing the merit of the charge by innuendo that cooperatives are big enough and strong enough to be a significant factor in raising food prices unreasonably. We find the charge to be devoid of merit and unwarranted."

Some of the statements made by Mr. Graham are well worth quoting:

"The Justice Department statement is remarkable for its naive and simplistic approach to competition in farm product markets. It does not understand how adversely the pricemaking process for farm products is distorted by the inequality in bargaining power that exists in farm product markets without farmer cooperatives."

"The statement indicates. . .that the Department of Justice doesn't understand how farmer cooperatives operate or how they are organized under the limited immunity granted by the Capper-Volstead Act. The Department doesn't recognize there is a fundamental difference between concentration which increases competition in the interest of consumers and that which decreases competition to the detriment of consumers."

"Joint action among farmers originated largely as a defensive mechanism to combat exploitation and abuse from their buyers and suppliers. The so-called changed conditions of farming—increased farm size, mechanization, improved managerial and operational skills of farmers—have not altered the basic market structure of agriculture.

"Capper-Volstead is vitally necessary today if consumers are to have the benefit of action which farmer cooperatives can provide as a partial countervailing effect on big agri-business firms. . ."

Since these hearings were held, farmer cooperatives have seen no reason for lowering their guard.[40] In the March 6, 1974, issue of *Dairynews,* the magazine of the Dairylea Cooperative, Inc., John E. Noakes pointed out that for the first time the very existence of the Capper-Volstead Act was threatened. Mr. Noakes was concerned that the public attitude toward cooperatives might be swayed by the abnormal economic and political situation of the past few years and

by the ever alert special interest groups antagonistic to farmer cooperatives.[41]

Changing Structure of Marketing Cooperatives

Taking a broad view, there has not been as much structural change in marketing cooperatives as is commonly assumed. We had strong federated and strong centralized cooperative marketing associations by 1922 when the Capper-Volstead Act was passed. The big change has occurred in amplification and intensification of development. While in 1922 we had only a few strong centralized and federated marketing cooperatives, today we have few local associations that are not members of federated cooperatives, and we have many more comprehensive cooperatives organized on the centralized pattern.

Moreover, our present-day cooperatives generally perform more marketing and related services for their members such as in processing, warehousing, and transportation. Some have even become conglomerate in character through handling widely diversified farm products. For example, Land O'Lakes not only is the largest butter manufacturer, but also is deeply involved in marketing and processing cheeses, milk powder, turkeys, and margarine. Gold Kist Inc. not only markets cotton but also is an important processor and marketer of pecans and peanuts, broilers, and other farm products.

The record of cooperative growth since 1922 has been impressive. In that year, the volume of products marketed cooperatively was less than $2 billion. By 1969-70, the volume was up to $15 billion. Much of this growth has come since World War II, when cooperative marketing volume was about $3.5 billion. By 1950-51, it exceeded $6 billion and by 1960 it was nearly $10 billion. Thus, from 1960 to 1970 there was a 50 percent increase, although a substantial part represented inflated prices. It is interesting that the proportion of particular commodities cooperatively marketed changed little. Dairy products represented 33.7 percent of all products cooperatively marketed in 1960-61 and 34.6 percent in 1969-70; Grain, soybeans, etc., represented 21.8 percent in 1960-61 and 20.3 percent in 1969-70; livestock and livestock products, 14.9 percent and 14.4 percent; and fruits and vegetables, 9.8 percent and 12.0 percent for the 2 years, respectively. Other farm products represented 19.8 percent of all farm products cooperatively marketed in 1960-61 and 18.5 percent in 1969-70.

Without doubt there has been a great strengthening of cooperative marketing organizations since the Capper-Volstead Act was passed,

and it can be given much credit for giving such organizations the legal protection they required and deserved. Since 1922, cooperatives have grown steadily in managerial competence, better organizational structure and methods, financial strength, and in enlightened membership administration. All of these factors have greatly increased internal operating efficiency and provided more savings and improved services for members and substantial benefits for consumers.

In view of the revolution in agriculture that has occurred since World War II, it is surprising how well cooperatives have been able to adapt their organizations to meet the needs of a smaller number of larger but more efficient farmers. Few people realize how much cooperatives have contributed to the vaunted efficiency of our American agriculture by providing farmers with business organizations under their own control. This has helped maintain a farming population that is self-reliant and resourceful. These organizations have given farmers a larger share of the rewards from their industry through the return of savings in patronage refunds and in services which help them as farmers to increase their producing efficiency. Cooperative marketing organizations thus have done much to preserve initiative in our farming industry.

Marketing cooperatives have also provided a very important competitive factor in agriculture. These organizations have forced other agribusiness firms to provide improved services at lower prices if they would remain in business. Cooperatives thus have helped maintain the American free competitive enterprise system the antitrust laws are designed to promote.

Over the past decade, there has been a growing realization among students of our economy that growing concentration in American industry is endangering the Nation's welfare, and that all possible steps should be taken to stimulate types of business organization that will help keep the economy more competitive. On this I would like to quote from a statement made on December 10, 1972, by Dr. A. C. Hoffman, retired vice-president of Kraft Foods Co., at the hearings on "Corporate Gigantism and Concentration of Control in the Food Industries," held by the Small Business Committee of the U.S. Senate. He said:

"There are two ways in which competition can be preserved in the American economy. The first is by insuring that concentration of control does not go beyond the point where workable competition is destroyed... The second is to preserve small- and medium-sized

business enterprise, including the cooperatives. . . A special word about cooperatives and cooperative organizations, for I believe they offer one of the best hopes for small and independently owned enterprises, including the family farm."

It is a currently accepted belief in the United States that a business must be big to survive in a business world of increasing bigness. Cooperatives, like other business firms, have adopted this belief and they have striven to grow in order to achieve all possible advantages of efficiency and bargaining power for the benefit of their producer members. Although they have had some success in increasing the size of their organizations through internal strength and by limited merger activity, they have not been able to generally build organizations comparable in size and power to the organizations with which they must deal and compete. This is shown by a study recently made by Dr. Martin A. Abrahamsen, former deputy administrator of Farmer Cooperative Service.[42] In this study, he said:

"Changes in the noncooperative sector of the economy necessitate larger cooperatives. . . Mergers have occurred by the thousands, horizontal and vertical integration has been pronounced, and huge conglomerate business enterprises operate highly diversified business operations. These firms have marshaled the financial resources necessary to achieve substantial market penetration. The cooperative becomes the farmer's major economic tool to help him approach, even to a limited extent, the economic power these firms have as he deals with them in the market place. These firms are becoming substantially larger than most of those that farmers have been able to organize and operate."

Where We Are

Cooperative marketing associations are confronted with a serious challenge to the perpetuation of their great contribution to the American economy. The attack on their rights under the Capper-Volstead Act represents an attack on the whole conception of cooperative marketing which has served this Nation well. It is evident that marketing cooperatives must compose their differences, maintain high standards of ethical performance, and more fully explain their structures and procedures to demonstrate their basic importance to the American public. If they do so, I have confidence in the result. To quote the old proverb: "The price of liberty is eternal vigilance."

REFERENCE NOTES

1. See Charles and Mary Beard, *The Rise of American Civilization,* II, (New York, The MacMillan Company, 1927), p. 327.

2. Nourse held that it was significant that such an amendment was ever considered in view of the embryonic state of cooperative development at that time. For full discussion, see Edwin G. Nourse, *The Legal Status of Agricultural Cooperation,* (New York, The Macmillan Company, 1927) pp. 241-248.

3. See discussion of the "Rule of Reason" by John. M. Blair, *Economic Concentration,* (New York, Harcourt Brace Jovanovich, 1972), p. 560 ff.

4. For more complete information see Joseph G. Knapp, *The Rise of American Cooperative Enterprise, 1620-1920,* (Danville, Ill., Interstate Printers and Publishers, Inc., 1969), p. 99 ff.

5. Edwin G. Nourse, *The Legal Status of Agricultural Cooperation,* (New York, The Macmillan Company, 1927), see p. 246.

6. Nourse, *op. cit.,* pp. 247, 248.

7. In the following material describing the drive for the Capper-Volstead Act of 1922 I have drawn generously on a brief history of the Capper-Volstead Act furnished me in 1944 by John D. Miller, who more than any other person drafted the legislation and led the fight for the Capper-Volstead Act. I have also reviewed the Senate Hearings on the act held in June 1921, and the debate of the Senate on the act in February 1922 as given in the *Congressional Record.* I have also found exceedingly useful Seward Miller's *History and Interpretation of the Capper-Volstead Act,* prepared in 1948 for the National Milk Producers Federation.

8. For a full discussion of this important conference see Joseph G. Knapp, *The Advance of American Cooperative Enterprise,* 1920-1945, (Danville, Ill., Interstate Printers and Publishers, 1973), pp. 22-26.

9. The bill passed the Senate with 58 yeas and 1 nay, and with 37 not voting. Senator Walsh voted for the bill.

10. See Edwin G. Nourse, chapter on "Agriculture" in *Government and Economic Life,* Vol. II., (Brookings Institution, 1940), p. 888.

11. This basic handbook has been continuously revised to the present date under the title, *Legal Phases of Farmer Cooperatives* by Morrison Neely, of the USDA legal staff. From the date of its first publication, it has been recognized as the bible for those who have an interest in the legal problems of cooperatives. Its growing size has indicated the ever-increasing importance of cooperative legal problems.

12. See Hulbert, *Legal Phases of Farmer Cooperatives,* Part III, Antitrust Law, (Farmer Cooperative Service Information 70), pp. 43-45.

13. In a letter to Joseph G. Knapp, July 18, 1946.

14. See Seward A. Miller, "The Capper-Volstead Act—Its Background, History and Interpretation," (*American Cooperation,* 1950), pp. 396-412.

15. U.S.D.A. *Yearbook of Agriculture,* 1954, p. 253.

16. University of California Agricultural Experiment Station Bulletin 888, 1921. This important bulletin provides valuable information on structural and technological changes in agricultural marketing from 1940 to 1945, and year-to-year information on mergers and acquisitions by cooperatives and noncooperative firms, etc.

17. *American Cooperation,* 1958, pp. 181-183.

18. In this same year, Mischler, in an article on "Agricultural Cooperative Law," in the June issue of the *Rocky Mountain Law Review,* examined the value of the Capper-Volstead Act to cooperative marketing associations. He held that this act provided a number of valuable benefits to marketing cooperatives, although it did not free cooperatives "to engage in concerted restriction of agricultural output, coercion of competitors or customers, or use of monopoly power."

19. Hearings before a subcommittee of the Committee on Agriculture and Forestry, United States Senate, 86th Congress, 1st Session, on S. 2014 (August 13, 14, and 17, 1959).

20. See Joseph G. Knapp, *Farmers in Business* (American Institute of Cooperation, 1963), pp. 289-300.

21. For a full analysis of this decision with a copy of the decision itself, see Donald D. Stark, "Capper-Volstead Revisited" in *American Cooperation,* 1960, pp. 453-473. See also discussion of this decision by Sherman R. Hill, Director, Bureau of Investigation, Federal Trade Commission, in the same volume, pp. 443-452.

22. See Raymond J. Mischler, "Unfolding Legal Guidelines for Cooperatives," talk given at 45th Annual Convention of National Milk Producers Federation, November 18, 1961. See also statement by Harold Jordan, *American Cooperation,* 1961, pp. 388-9. According to Mr. Jordan: "Very competent lawyers in the cooperative field differ as to the necessity for this type of legislation. It just happens to be my personal view that legislation of this character is unneeded and perhaps unwise. . . I believe that within the present framework of the law, farmer cooperative associations can achieve the degree of integration that is needed for their development."

23. See section on "Lessons for Farm Economists from Recent Antitrust Decisions" in Proceedings number of the *Journal of Farm Economics,* December 1962, pp. 1589-1626.

24. Howard Dresback, *American Cooperation,* 1962, p. 346. In commenting on the decision, Raymond J. Mischler said: "Although this decision is distinctly helpful to those cooperatives which perform their functions in multicorporate groups, the decision does not hold that a farmer cooperative is in any way protected if it conspires with one or more noncooperatives. The decision does not deal with the antitrust effects of a conspiracy between two or more cooperatives with unrelated owners." *Ibid.,* p. 358.

25. See George Tucker, "Progress in the Last Seven Years," *American Cooperation,* 1966, pp. 291-296.

26. For more complete information see Ronald D. Knutson, *Cooperative Bargaining Developments in the Dairy Industry, 1960-70. . . With Emphasis on the Central United States,* (Farmer Cooperative Service, Research Report No. 19, 1971), pp. 5-10.

27. *American Cooperation,* 1965, pp. 179-191.

28. *American Cooperation,* 1966, pp. 38-44.

29. For full discussion of the reasons for this development see George C. Tucker, *Need for Restructuring Dairy Cooperatives,* (Farmer Cooperative Service, Service Report 125, 1972), especially pp. 43-52.

30. Harold Nelson, "Progress in the Southwest—After Merger, What?" *American Cooperation,* 1968, pp. 215-219.

31. For more complete information see Ronald D. Knutson, *Cooperative Bargaining Developments in the Dairy Industry, 1960-70.*, (Farmer Cooperative Service Research Report No. 19, 1971), especially p. 10 ff.

32. The way in which this was done is well told by Kenneth D. Ruble, in *Farmers Make It Happen,* (Minneapolis, Land O' Lakes, Inc., 1973) see chapter entitled "The 'Invisible Merger,' " pp. 89-100.

33. See 75th Annual Report of Sunkist Growers, Inc., 1968, statement of General Manager, p. 5. L. S. Hulbert was no doubt thinking of this decision when he said at the AIC meetings in 1969: "Cooperatives should proceed on the theory that a physician is cheaper than a surgeon. . ." He advised cooperatives to remember that to obtain the protection of the Capper-Volstead Act, a cooperative must meet its terms and conditions. See *American Cooperation,* 1969, p. 92.

34. *American Cooperation,* 1968, p. 146.

35. *American Cooperation,* 1971, pp. 154-158.

36. *American Cooperation,* 1972-73, p. 281.

37. John E. Butterbrodt, Proceedings of the 17th National Conference on Bargaining Cooperatives, Jan 7-8, 1973, Farmer Cooperative Service, (1973), p. 15-17.

38. *Dairy Marketing Facts,* a report issued by Department of Agricultural Economics and Cooperative Extension Service, College of Agriculture, University of Illinois, pp. 1-4. In this informative talk, Noakes urged that "the present Capper-Volstead Act should be utilized affirmatively and energetically in arriving at the full marketing potential for dairy cooperatives," but he cautioned against abusing privileges conferred by it.

39. Mr. Kauper supported this statement by saying: "In line with these recommendations I would note that the Report of the Attorney General's National Committee to Study the Antitrust Laws, issued in 1955, contains a recommendation by some members of that committee that cooperatives and 'their impact upon processors and distributors and consumers, as well as their erosion of antitrust policy in wide areas, warrant close reexamination.' The need for reexamination, in our view, has not diminished." It should be noted that Mr. Kauper quoted the Report of the Attorney General's National Committee out of context. When one examines the statement made in the report (page 312) it is clear that the recommendation of "some members" applied specifically to certain types of cooperatives under marketing agreements and orders, rather than to all agricultural marketing cooperatives.

40. For full information on testimony see *Hearings* Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 93d Congress–1st Session on Food Price Investigation, June 27, 28; July 11, 12, 16, 17 and 19, 1973.

41. See "Andrew John Volstead, Where Are You?", *Dairynews,* March 6, 1974, pp. 13 and 32.

42. See *Cooperative Growth, Trends, Comparisons, Strategy,* Farmer Cooperative Service, FCS Information 87, 1973. In this study the four largest dairy cooperatives were compared with the four largest other businesses handling dairy products. The data indicated that the four largest dairy cooperatives in 1970 were still much smaller in total sales and assets than the four largest businesses handling dairy products. See pp. 35-47.

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U.S. DEPARTMENT OF AGRICULTURE

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